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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
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March 21, 2019

Board of Zoning Appeal
831 Massachusetts Avenue
Cambridge, MA 02139

Re: 1407 Cambridge Street (Vellucci Plaza), Case No. BZA-017068-2019

To the Board of Zoning Apepal:

I am submitting this legal opinion in response to the Board of Zoning Appeal's (the "Board") request for further legal guidance concerning the above-referenced appeal.

I. Background

On January 14, 2019, Michael Repucci, John Pitkin, Sara Mae Berman, Jonathan Harris and Debra Mandel requested that the Commissioner of the Inspectional Services Department (the "Commissioner") enforce the Cambridge Zoning Ordinance (the "Zoning Ordinance"), pursuant to G.L. c. 40A, § 7, regarding work planned and being performed at Vellucci Plaza in Inman Square, which is located within an Open Space Zoning District under the Zoning Ordinance. The work is being performed by the City of Cambridge (the "City") and is part of the Inman Square Intersection Safety Improvements Project, which includes the redesign of the Hampshire Street and Cambridge Street Intersection in Inman Square and the redesign and reconstruction of the City park known as Vellucci Plaza (the "Project").

On January 28, 2019, the Commissioner responded and declined to take any enforcement action concerning the Project as the Project does not violate the Zoning Ordinance (the "Determination"). This appeal followed. The petitioners are the individuals who sought zoning enforcement, along with Gary Mitchell, Aimee Baum and Michael Carr (collectively, the "Petitioners").

Previously, on March 5, 2018, the City Council had requested an opinion as to whether Section 4.25 of the Zoning Ordinance was applicable to the Project. In response, I provided the attached opinion, dated April 2, 2018, through the City Manager to the City Council in which I determined that Section 4.25 was inapplicable to the Project (the "Council Response").

II. Legal Analysis

A. The Use of Land for a Public Way is Not Subject to Zoning

As set forth in the Commissioner's Determination and in the Council Response, the layout, relocation or alteration of a public way is not subject to zoning. Harrison v. Textron, Inc., 367 Mass. 540, 549 (1975). The Petitioners, through counsel, attempt to distinguish the Supreme Judicial Court's decision in Harrison v. Textron, Inc. and argue that the Harrison case only addresses whether the use of a public way already in existence can be limited to the uses allowed in the zoning district in which it is located. Petitioners argue that Harrison is a case about the use of a public way, and not the laying out or construction of a public way. That is a distinction without a difference. Furthermore, the Harrison case in fact did concern the creation of a public way, with the only difference being that in Harrison an existing private way was accepted as a public way, and here, the City will construct a new way and then vote to accept it as a public way.

The Harrison case stands for the proposition that the use of land for a public way, whether it is the initial layout of the public way or the use of an already existing public way, is not subject to zoning. The Harrison case is the culmination of multiple lawsuits all arising out of an industrial use in an industrial zoning district by the defendant, Textron, Inc. The facts are that within the Town of Braintree there existed an industrial zoning district, but there were no public ways that led to the industrial zoning district, and any private access ways had to cross through residential zoning districts. It is undisputed that a private way used for access that goes through one district to get to a use in a second district is only permissible if the use is allowed in both districts. In other words, a private way that goes through a residential zoning district to access an industrial use would not be permissible pursuant to the holding in Harrison.

While lawsuits related to the Harrison case were pending, the town voted to accept as a public way what had been previously private way used as an access road that led to the defendant's property as a public way. In the Harrison case, the plaintiffs were seeking an order commanding the building inspector to enforce the zoning by-laws against the use of the private way, but once the access road was accepted as a public way, the Court held that the claim was moot. The Court went on to conclude:

> The plaintiffs argue, however, that even if Farm River Drive [the way in question] had attained the status of a public way, its use violated the zoning by-law because a public way is not exempt from the application of local zoning restrictions. This claim is contrary to the implication of our statement in Harrison v. Braintree, 355 Mass. At 656 [ ] (1969), regarding possible solutions to the inaccessibility [i.e., that no public ways led to the industrial zoning district and that private access ways were not allowed through residential zoning districts], in a zoning sense, of the Textron premises. We said: 'The town is not in a straightjacket. It may lay out public ways.'
>
> **Although a municipality is subject to its own regulations, we know of no authority for the proposition that a public way, laid out by municipal action, pursuant to statute, may be used only for purposes which are**

provisions.

Harrison, 367 Mass. at 549 (internal citations omitted) (emphasis added).

Accordingly, the Court held in Harrison, that the town could lay out a public way and use it for public travel even though that use was not permitted in the underlying zoning district.

If we were to follow the Petitioners' logic, a community that is still growing and being developed would be prevented from laying out and accepting public ways in residential zoning districts to reach new residential developments if a public way was not expressly listed as an allowed use in that residential zoning district. Petitioners' position that zoning cannot restrict the use of a public way that is already in existence but can restrict the laying out and acceptance of a public way defies logic. As the Land Court recently found, **"zoning bylaws *do not* and, as a matter of zoning law, *cannot* regulate public ways."** Chaput v. Kane, 2018 WL 5622263, 17 MISC 000062 (2018) (emphasis added.)

Therefore, based on the above, the City can relocate Hampshire Street so that it will be laid out and used in the Open Space Zoning District.

B. Zoning Ordinance Section 4.25 is Not Applicable to the Project Because the Use of Land for a Park is an Allowed Use in an Open Space District

For the reasons set forth above, the Zoning Ordinance does not apply to the relocation of Hampshire Street, so Section 4.25 is not applicable. Furthermore, the Project includes the use of Vellucci Plaza as a park and recreational open space use. Zoning Ordinance Section 4.25 provides: "[a]ll uses in an Open Space District other than a park or recreation use permitted by Subsection 4.33.f shall comply with the procedural requirements of this Subsection prior to the issuance of any building or special permit, variance or other approval or before conveyance of any lot within the district." (Emphasis added.) Accordingly, the park and recreational open space uses of Vellucci Plaza are allowed by right and are not subject to Planning Board review pursuant to Zoning Ordinance Section 4.25.

Further, Section 4.25 is not applicable because the physical improvements and amenities that are being proposed for the Project do not include construction of any building or structure that would require either a building permit, variance or special permit.

C. The Project is Not a Municipal Service Facility, Pursuant to Zoning Ordinance Section 4.33.f

The Petitioners argue that the Project falls under the definition of Municipal Service Facility, and therefore, requires both a special permit, and Planning Board review pursuant to Zoning Ordinance Section 4.25. Zoning Ordinance Section 4.33.f allows certain Local

Government Uses in an Open Space District, and that includes a Municipal Service Facility, which is allowed by special permit and subject to Planning Board review, pursuant to Zoning Ordinance Section 4.25. The definition of a Municipal Service Facility pursuant to Zoning Ordinance Article 2, is "[the] use of land or structures by the City of Cambridge or other municipality for maintenance operations, public utilities, public works and similar governmental functions."

As set forth above, the Project is not a Municipal Service Facility because 1) it includes the relocation of public way, i.e. Hampshire Street; and 2) the reconstruction of Vellucci Plaza as a park and recreational open space, and such uses do not come within the definition of Municipal Service Facility. Additionally, for a use to be a Municipal Service Facility it has to be the use of land or structures by the City, but the Project includes a public way and a park, both of which constitute the use of land by the public. An example of Municipal Service Facilities is the City's Department of Public Works ("DPW") yard which is used to park and store the City's DPW vehicles and equipment.

Therefore, for all of these reasons it is clear that the Project is not a Municipal Service Facility that requires a special permit and review pursuant to Zoning Ordinance Section 4.25.

Very truly yours,

Nancy E. Glowa

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